BRB No. 02-0770 BLA

BRYANT HESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/01/2003
	)	
DOMINION COAL CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Fourth Remand - Awarding Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Fourth Remand - Awarding Benefits of Administrative Law Judge Alexander Karst on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case is before the Board for the fifth time. Claimant filed a

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[1] The Department of Labor has amended the regulations implementing the Federal

duplicate claim on July 17, 1990.[2] By Decision and Order dated May 4, 1992, Administrative Law Judge George A. Fath found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, Judge Fath denied benefits. By Decision and Order dated December 28, 1993, the Board held, *inter alia*, that Judge Fath erred in weighing the evidence supportive of a finding that claimant established a material change in conditions against the contrary evidence and erred in holding that claimant was required to demonstrate a material change in conditions with respect to all elements of entitlement that he failed to establish in his earlier claim. *Hess v. Dominion Coal Corp.*, BRB No. 92-1702 BLA (Dec. 28, 1993) (unpublished). The Board, however, held that this error was harmless inasmuch as Judge Fath's finding that the medical evidence of record was insufficient to establish that claimant's total disability was due to pneumoconiosis could be affirmed. *Id.* The Board, therefore, affirmed Judge Fath's denial of benefits. *Id.* By Decision and Order dated September 30, 1994, the United States Court of Appeals for the Fourth Circuit held that the reasoning relied upon by the Board was insufficient to support a denial of benefits. *Hess v. Dominion Coal Corp.*, No. 94-1066 (4th Cir. Sept. 30, 1994) (unpublished). The Fourth Circuit, therefore, vacated the Board's Decision and Order and remanded the case to the Board for further review. *Id.*

By Order dated December 14, 1995, the Board vacated its December 28, 1993 Decision and Order and remanded the case for further consideration. *Hess v. Dominion Coal Corp.*, BRB No. 92-1702 BLA (Dec. 14, 1995) (Order) (unpublished).

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on December 15, 1983. Director's Exhibit 48. By Decision and Order dated February 29, 1988, Administrative Law Judge Gerald T. Hayes found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Hayes further found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, Judge Hayes denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1983 claim.

Claimant filed a second claim on July 17, 1990. Director's Exhibit 1.

[3]Although 20 C.F.R.§725.309 has been revised, the revisions only apply to claims filed after January 19, 2001.

Due to Judge Fath's unavailability, Administrative Law Judge Alexander Karst (the administrative law judge) reconsidered the claim on remand. In a Decision and Order on Remand dated September 30, 1996, the administrative law judge found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge, therefore, considered the merits of claimant's 1990 claim. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b)(2000). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4) (2000) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated November 25, 1997, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) (2000), 718.203(b) (2000) and 718.204(b) and (c) (2000). *Hess v. Dominion Coal Corp.*, BRB No. 97-0279 BLA (Nov. 25, 1997) (unpublished). The Board, therefore, affirmed the administrative law judge's award of benefits. *Id.*

Employer subsequently filed a motion for reconsideration. By Decision and Order on Motion for Reconsideration dated July 21, 1998, the Board vacated the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and remanded the case for further consideration. *Hess v. Dominion Coal Corp.*, BRB No. 97-0279 BLA (July 21, 1998) (Order on Recon.) (unpublished) (McGranery, J., dissenting). The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b) and (c) (2000). *Id.*

On remand for the second time, the administrative law judge found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). In his consideration of the merits of claimant's 1990 claim, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b)(2000). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated September 29, 2000, the Board affirmed the administrative law judge's denial of employer's motion to reopen the record on remand. *Hess v. Dominion Coal Corp.*, BRB No. 99-0758 BLA (Sept. 29, 2000) (unpublished). The Board also affirmed the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R.

§718.204(c)(4) (2000). However, because the administrative law judge did not adequately discuss all of the contrary probative evidence, the Board vacated the administrative law judge's finding that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and remanded the case for further consideration. *Id*. In light of this holding, the Board also vacated the administrative law judge's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The Board further noted that, subsequent to the issuance of the administrative law judge's 1999 Decision and Order on Remand, the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *Id.*; s*ee Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board, therefore, remanded the case to the administrative law judge for his weighing of all the evidence together under Section 718.202(a) in accordance with *Compton*. *Id.* The Board also vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b) (2000). *Id.*

On remand for the third time, the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and was, therefore, sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge, therefore, considered the merits of claimant's 1990 claim. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, the administrative law judge awarded benefits. By Decision and Order dated January 29, 2002, the Board noted that the administrative law judge, in considering whether the newly submitted evidence was sufficient to establish a material change in conditions, failed to weigh claimant's August 22, 1990 and December 21, 1990 pulmonary function studies, along with the contrary probative evidence, despite being instructed to do so by the Board in its prior decisions. *Hess v. Dominion Coal Corp.*, BRB No. 01-0473 BLA (Jan. 29, 2002) (unpublished). The Board, therefore, vacated the administrative law judge's finding that the newly submitted evidence was sufficient to establish total disability and remanded the case for the administrative law judge to specifically weigh the contrary probative evidence under 20 C.F.R. §718.204(b).[4] *Id.* In light of this holding, the Board also vacated

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[4] The provision pertaining to total disability previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

the administrative law judge's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The Board further vacated the administrative law judge's finding that the x-ray evidence was in "equipoise" and remanded the case for further consideration. *Id.* The Board also vacated the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis and his finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis.

On remand for the fourth time, the administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). Weighing all of the relevant newly submitted evidence together, the administrative law judge also found that the weight of the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge, therefore, considered the merits of claimant's 1990 claim. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309 (2000) and 718.202(a) and 718.204(b) and (c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that 20 C.F.R. §718.204(a) is not applicable in the instant case.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially challenges the administrative law judge's finding that the newly submitted evidence establishes total respiratory disability pursuant to Section 718.204(b) and, thereby, a material change in conditions pursuant to Section 725.309 (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable or unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines* v. *Director, OWCP, [Rutter]*, 86 F. 3d

1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied,* 117 S. Ct. 763 (1997). Employer specifically challenges the administrative law judge's finding that the newly submitted pulmonary function studies establish total respiratory disability at Section 718.204(b)(2)(i). The Board has instructed the administrative law judge, in three previous decisions, to consider those non-qualifying pulmonary function studies of record which fail to conform to the quality standards due to a lack of cooperation, as contrary probative evidence at Section 718.204(b)(2)(i). *Hess v. Dominion Coal Corp.,* BRB No. 01-0473 BLA (Jan. 29, 2002)(unpublished), slip op. at 7. The administrative law judge stated that he did not reject outright the pulmonary function studies performed by Dr. Abernathy on August 22, 1990 and Dr. Endres-Bercher on December 21, 1990. Decision and Order on Fourth Remand at 5-7; Director's Exhibit 10; Employer's Exhibit 1. The administrative law judge discussed the invalidation reports of Drs. Endres-Bercher, Castle, and Tuteur, however, without ever weighing the studies of Drs. Abernathy and Endres-Bercher. Decision and Order on Fourth Remand at 5-7. Moreover, the administrative law judge discounted Dr. Renn's validation reports because Dr. Renn did not review evidence other than the pulmonary function studies in question, disregarding Board's previous instructions to "explain how Dr. Renn's review of additional evidence would assist him in evaluating the reliability and usefulness of the values obtained from claimant's August 22, 1990 and December 21, 1990 pulmonary function studies." *Hess v. Dominion Coal Corp.*, BRB No. 01-0473 BLA (Jan. 29, 2002)(unpublished), slip op. at 6; Employer's Exhibits 23, 24. We agree with employer's contention that the administrative law judge substituted his own judgment for that of the physicians, as the administrative law judge "interpreted" the invalidation reports for himself, rather than weighing them. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1- 131 (1986); Decision and Order on Fourth Remand at 5-7. Moreover, the administrative law judge purported to credit Dr. Robinette's May 23, 1991 pulmonary function study on the basis of its recency, without further explanation, despite the fact that it is only five months later than Dr. Endres-Bercher's study. Decision and Order on Fourth Remand at 7; Claimant's Exhibit 1. We hold that the administrative law judge's failure to adhere to our previous instructions, specifically, to consider the pulmonary function studies performed by Drs. Abernathy and Endres-Bercher and to consider Dr. Renn's validation report, constitutes error. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987)*; Crapp v. Director, OWCP*, 6 BLR 1-476 (1983); *Hess v. Dominion Coal Corp.,* BRB No. 01-0473 BLA (Jan. 29, 2002)(unpub.). We vacate, therefore, the administrative law judge's finding that the newly submitted evidence establishes total respiratory disability pursuant to Section 718.204(b) and, thereby, a material change in conditions pursuant to Section 725.309 (2000).[5]

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[5]Additionally, as employer correctly argues, Dr. Robinette's values contain a notation that indicates the values recorded fall outside a 95% confidence level. Claimant's Exhibit 1. The quality standards set forth at Appendix B, which are applicable to pulmonary function studies, state that the instrument recording the values must be accurate within three percent of

Employer next challenges the administrative law judge's finding on the merits that the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4). Employer contends that the administrative law judge erred in crediting Dr. Robinette's opinion at Section 718.202(a)(4). Employer also contends that the administrative law judge again impermissibly relied upon pulmonary function study evidence to support his determination at Section 718.202(a)(4), despite the Board's explicit instructions not to do so.[6]

The administrative law judge credited the opinion of Dr. Robinette over the contrary opinions of Drs. Abernathy, Endres-Bercher, Tuteur and Castle, in part because he found that Dr. Robinette was the only doctor who utilized a *qualifying* pulmonary function study to make his diagnosis. Decision and Order on Fourth Remand at 9-11. The Board previously instructed the administrative law judge that qualifying pulmonary function studies are relevant to the issue of total disability and not the existence of pneumoconiosis. *Hess v. Dominion Coal Corp.,* BRB No. 01-0473 BLA (Jan. 29, 2002)(unpublished), slip op. at 10, *citing Trent v. Director, OWCP*, 10 BLR 1-26, 1-28 (1987). On remand, the administrative law judge declined to apply the ruling in *Trent*, as he concluded it was inconsistent with the Act and "contrary to the holding in this case and in other cases of the United States Court of Appeals for the Fourth Circuit." Decision and Order on Fourth Remand at 9. The administrative law judge failed to explain why Dr. Robinette's consideration of a qualifying pulmonary function study entitles his opinion to greater weight at Section 718.202(a)(4) than the contrary opinions of Drs. Abernathy, Endres-Bercher, Tuteur and Castle, who based their opinions, in part, on non-qualifying pulmonary function studies. Further, the administrative law judge based his finding of pneumoconiosis at Section 718.202(a)(4), in part, on errors made in his consideration of the pulmonary function studies at Section 718.204(b)(2)(i). *Supra* at 6-7.

Furthermore, at Section 718.202(a)(4), the Board previously instructed the administrative law judge to apply the holding set forth in *Island Creek Coal Co. v. Compton*,

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the reading. 20 C.F.R. Part 718, Appendix B. On remand, therefore, the administrative law judge must explain how the quality standards set forth in Appendix B apply to Dr. Robinette's pulmonary function study.

[6] We reject employer's contention that Dr. Robinette's medical opinion is equivocal because he stated that the blood gas studies were "felt to be compatible with moderately severe restrictive lung disease." Claimant's Exhibit 1; Employer's Brief at 21. Dr. Robinette made more definitive statements in the "Impression" section of his opinion, wherein the doctor affirmatively stated that claimant suffered from coal workers' pneumoconiosis. Claimant's Exhibit 1.

211 F. 3d 203, 22 BLR 2-162 (4th Cir. 2000). *Hess v. Dominion Coal Corp.,* BRB No. 01-0473 BLA (Jan. 29, 2002)(unpublished), slip op. at 11. The Board also instructed the administrative law judge to consider the qualifications of Drs. Tuteur, Castle and Endres-Bercher and noted the fact that Dr. Robinette's credentials are not of record.[7] *Id.* n. 9. Additionally, the Board instructed the administrative law judge to apply *Milburn Colliery Co. v. Hicks,* 138 F. 3d 524, 21 BLR 2-323 (4th Cir. 1998), and *Sterling Smokeless Coal Co v. Akers*, 131 F. 3d 438, 21 BLR 2-269 (4th Cir. 1998). The administrative law judge's decision on remand does not reflect adherence to the Board's instructions and the administrative law judge offered no rationale for crediting Dr. Robinette's opinion over all of the contrary opinions of record at Section 718.202(a)(4). The administrative law judge's failure to follow our previous instruction on remand constitutes error and is additionally inconsistent with the requirements of the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 33 U.S.C. §919(d), and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162 (1989). We vacate, therefore, the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). On remand, the administrative law judge must provide a complete explanation for his findings, consistent with our previous instructions and the requirements of the APA.

Employer also asserts that the administrative law judge failed to consider the non-qualifying blood gas studies of record at Section 718.204(b)(2)(ii).[8] We agree. We previously instructed the administrative law judge to weigh the three non-qualifying blood gas studies of record and to explain what weight he accorded each study. *See Hess v. Dominion Coal Corp.,* BRB No. 01-0473, BLA (Jan. 29, 2002)(unpublished), slip op. at 7, n. 5. On remand, the administrative law judge weighed the pulmonary function studies against the medical opinion evidence, but failed to consider the blood gas study evidence at Section 718.204(b). Rather than weighing the blood gas studies as instructed, the administrative law judge merely noted that claimant need not establish total respiratory disability by every means under Section 718.204(b). The administrative law judge's failure

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[7] The administrative law judge, on remand, responded to the Board's instructions by noting that he had previously taken judicial notice of Dr. Robinette's credentials, which were not contradicted by employer. *See Hess v. Dominion Coal Corp.,* BRB No. 01-0473 BLA (Jan. 29, 2002)(unpublished), slip op. at 12.

[8] The Board previously affirmed the administrative law judge's finding that the medical opinion evidence establishes total respiratory disability at Section 718.204(b)(2)(iv). *See Hess v. Dominion Coal Corp.,* BRB No. 01-0473 BLA (Jan. 29, 2002)(unpublished), slip op. at 7, n.5. This finding constitutes the law of the case. *See Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

to weigh the blood gas study evidence at Section 718.204(b)(2)(ii) and to consider it as contrary probative evidence at Section 718.204(b)(2) constitutes error. We vacate, therefore, the administrative law judge's determination at Section 718.204(b)(2)(ii), and thus, his finding that total respiratory disability is established at Section 718.204(b).

Employer next challenges the administrative law judge's finding of total respiratory disability due to pneumoconiosis at Section 718.204(c). Employer first contends that Dr. Robinette's opinion is insufficient as a matter of law to support the administrative law judge's finding of disability causation pursuant to Section 718.204(c).[9] Dr. Robinette opined, based upon an x-ray reading, that claimant suffers from coal workers' pneumoconiosis, with a profusion abnormality of 1/0, predominant Q/T opacities. Claimant's Exhibit 1. He opined that claimant has a "moderately severe lung disease", and described both restrictive and obstructive lung disease. *Id.* The Board previously held that Dr. Robinette did not specifically attribute claimant's lung disease to coal mine employment. *Hess v. Dominion Coal Corp.,* BRB No. 92-1702 BLA (Dec. 28, 1993)(unpublished), slip op. at 3.[10] On appeal, the Fourth Circuit reversed the Board, however, holding in an unpublished decision, that because claimant had more than ten years of coal mine employment, if pneumoconiosis was definitively established, Section 718.203 would give claimant a rebuttable presumption that his totally disabling respiratory impairment was due to pneumoconiosis. *Hess v. Director, OWCP*, No. 94-1066 (4th Cir. Sept. 30, 1994)(unpublished), slip op. at 2. In light of the Fourth Circuit's previous directive in this case, we must reject employer's contention that Dr. Robinette's opinion is insufficient as a matter of law to establish disability causation.

Employer next argues that the administrative law judge failed to consider all of the evidence in the record relevant to the issue of disability causation. The Board previously held that the administrative law judge, in addressing disability causation, did not "adequately address the opinions of Drs. Abernathy, Castle, Endres-Bercher and Tuteur, each of whom provided non-coal mine employment related causes for claimant's respiratory problems." *Hess v. Dominion Coal Corp.,* BRB No. 01-0473 BLA (Jan. 29, 2002)(unpublished), slip op. at 11. On remand, the administrative law judge simply "reaffirmed" his prior finding.

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[9] Under *Robinson v. Pickands Mather & Co.,* 914 F. 2d 35, 14 BLR 2-68 (4th Cir. 1990), claimant must establish that pneumoconiosis is a substantially contributing cause of his total respiratory disability. Moreover, the applicable regulation requires that claimant establish that pneumoconiosis "is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c).

[10] Dr. Robinette's pneumoconiosis diagnosis is based solely upon an x-ray, as he describes it, and the administrative law judge has found that the x-rays are negative for pneumoconiosis. Decision and Order on Fourth Remand at 8-9.

Decision and Order on Fourth Remand at 13. We vacate, therefore, the administrative law judge's finding that claimant's disability is due to pneumoconiosis pursuant to Section 718.204(c). On remand the administrative law judge must reweigh the evidence pursuant to Section 718.204(c), in accordance with the Board's instructions.

In light of the foregoing, we remand this case for the administrative law judge to reconsider whether the newly submitted evidence establishes a material change in conditions pursuant to Section 725.309(d)(2000) and the Fourth Circuit's decision in *Rutter*. If the administrative law judge finds a material change in conditions established, he must then consider all of the evidence of record to determine whether it establishes pneumoconiosis at Section 718.202(a) and total disability due to pneumoconiosis at Section 718.204(b), (c), and thus, whether entitlement to benefits is established.

Finally, employer specifically requests a reassignment of the case to a new administrative law judge. Under the facts of this case, reassignment is appropriate. Cases that have maintained a "stalemated posture" because of a judge's intransigence require reassignment. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-108 (1992). Given his failure to follow our previous instructions on remand, reassignment is appropriate.

Accordingly, the administrative law judge's Decision and Order on Fourth Remand – Awarding Benefits is vacated and the case is remanded to the Office of Administrative Law Judges for reassignment to a new administrative law judge, and for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's opinion. I would reject employer's assertion that the administrative law judge failed to comply with the Board's directive on remand and would affirm the administrative law judge's award of benefits.

This case is being reviewed by the Board to determine whether the administrative law judge's decision is supported by substantial evidence. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has consistently described substantial evidence as more than a scintilla but less than a preponderance and has held that the findings of an administrative law judge may not be disregarded on the basis that other inferences might have been more reasonable. The court has held that deference must be given the fact-finder's inferences and credibility assessments, and it has emphasized that the scope of review of an administrative law judge's findings is limited. *See Newport News Shipbldg. and Dry Dock Co. v. Ward,* 326 F.3d 434, 37 BRB 17 (CRT) (4th Cir. 2003); *Norfolk Shipbldg. and Drydock Co. v. Faulk,* 228 F.3d 378 (4th Cir. 2000), *cert. denied,* 531 U.S. 1112 (2001); *Newport News Shipbldg. and Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988).

As has been noted, this case has a long and tortured history. This duplicate claim was filed over 13 years ago; has been to the Fourth Circuit which vacated and remanded the denial of benefits nine years ago; has been before three administrative law judges, the most recent of whom has already seen the case four times; and is now before the Board for the fifth time.

At the outset, I would affirm the administrative law judge's finding that the most recent pulmonary function study, which was valid and qualifying, when weighed with the other evidence in the record, establishes total disability. The administrative law judge explained in detail why he gave the two prior invalidated pulmonary function studies less weight. Specifically, employer's own doctors, including Dr. Tuteur and Dr. Castle, opined that these invalid studies "should not be accepted as evidence." Dr. Tuteur stated that "these pulmonary function data are of little help in assessing the presence *or absence* of significant physiologic impact, other than to say resting blood gas analysis is regularly within normal limits." (Emphasis added.) In his report of July 2, 1991, Dr. Castle reviewed each of the prior pulmonary function studies and stated, as to each, that "this is a totally invalid study and should not be accepted for evidence." Employer's Exhibit 28, p. 2. The administrative law judge further noted that all three of the doctors who reviewed the prior two pulmonary

function studies (Dr. Renn, Dr. Tuteur and Dr. Castle) found that they were not in substantial compliance with Section 718.103 and Appendix B to Part 718. On the other hand, Dr. Robinette concluded that the most recent pulmonary function study showed total disability. He was the only physician to review the most recent study and therefore the administrative law judge found that claimant had demonstrated total disability by the pulmonary function study evidence under Section 718.204(b)(2)(i). The administrative law judge pointed out that, while the Board instructed that he *may* weigh invalid pulmonary function studies in conjunction with valid ones, nothing required him to give more weight to invalid studies than to valid ones. As the administrative law judge explained, "I did weigh all three (pulmonary function) studies under Section 718.204(b)(2)(i). What I did not do was apply a presumption that the values on the invalid pulmonary function studies were conclusive evidence of the Claimant's minimum function on those days. Rather, I reviewed and weighed the medical opinions *in this record*, including Dr. Renn's, to determine what the invalid studies showed." 2002 Decision and Order at 5-6 The Board previously affirmed the administrative law judge's finding that the medical opinions establish total disability under Section 718.204(b)(2)(iv). The administrative law judge also determined that the arterial blood gas tests do not demonstrate total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Thus, when weighing the evidence that is in the record regarding total disability -- the pulmonary function studies, the arterial blood gas studies, and the medical opinion evidence, the administrative law judge recognized that "the Act does not require that total disability be shown by every means under Section 718.204(b)(2) in order for a claimant to be found to be totally disabled" and thus rationally concluded that the evidence of record established total disability at Section 718.204(b)(2). In so finding, the administrative law judge was justified in giving more weight to the most recent pulmonary function study and medical opinion evidence to find total disability. Therefore, I would affirm the administrative law judge's finding that the evidence of record establishes total disability.

I would also affirm the administrative law judge's finding on the merits that the evidence of record establishes the existence of pneumoconiosis at Section 718.202(a)(4). He indicated that he felt compelled by the Board's prior decisions to find the x-ray evidence to be negative and thus he so found. 2002 Decision and Order at 8. Regarding the medical opinion evidence, the administrative law judge credited the opinion of Dr. Robinette over the contrary opinions of Drs. Abernathy, Endres-Bercher, Tuteur and Castle, based in substantial part on the fact that Dr. Robinette was the only doctor who utilized the most recent pulmonary function study, which was both valid and qualifying, to make his diagnosis.
The administrative law judge correctly points out:

> *Not only does the Act permit a claimant to establish pneumoconiosis*, notwithstanding a negative x-ray, by medical opinions which are based on other medical evidence, *including pulmonary function studies*, §718.202(a)(4), but the statutory definition of pneumoconiosis requires the trier-of-fact to consider that the opinions may show pneumoconiosis, defined as "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." §718.201(b).

2002 Decision and Order at 9 (emphasis added)(footnote omitted).

The administrative law judge goes on to point out that when this case was before the Fourth Circuit, the court held that Dr. Robinette's diagnosis of restrictive lung disease falls within the definition of pneumoconiosis set forth in 20 C.F.R. §718.201. 2002 Decision and Order at 9. The administrative law judge continued: "While standing alone, a pulmonary function study cannot diagnose the presence or absence of pneumoconiosis; legal pneumoconiosis nonetheless can be established if the pulmonary function study shows an impairment, and a physician attributes that impairment to coal dust exposure." 2002 Decision and Order at 10. In the instant case, the administrative law judge rationally found that a valid, qualifying pulmonary function study showed an impairment, and that Dr. Robinette, the only physician of record who had access to this most recent pulmonary function study, attributed that impairment to coal dust exposure. 2002 Decision and Order at 10.

In light of the discussion above and the Fourth Circuit decision connected with this case, I would affirm the administrative law judge's finding that claimant's total disability is due to pneumoconosis.

Thus, I would affirm the administrative law judge's decision awarding benefits in its entirety.

BETTY JEAN HALL
Administrative Appeals Judge